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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/776,017	02/10/2004	Jon C. Alexander	076565-0135	9075
26371 7590 07/09/2008 FOLEY & LARDNER LLP 777 EAST WISCONSIN AVENUE MILWAUKEE, WI 53202-5306				
EXAMINER				
MOHANDESI, JILA M				
ART UNIT		PAPER NUMBER		
3728				
NOTIFICATION DATE		DELIVERY MODE		
07/09/2008		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

# Office Action Summary

**Application No.**

10/776,017

**Applicant(s)**

ALEXANDER ET AL.

**Examiner**

JILA M. MOHANDESI

**Art Unit**

3728

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on RCE 04/17/2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-41 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SE/US)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 04/17/2008 has been entered.

### ***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1-12 and 18-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Armstrong (5,366,104) in view of Luburic (Pub. No. US 2002/0148846) and Nakamura et al. (US 4,848,575). Armstrong '104 discloses a hermetic storage system for containing wipes comprising: a flexible container (11) having a collar (flange 21) which has a first portion extending outwardly away from outboard edge, a second portion extending downwardly and a first t connector (rolled over section 19) extending upwardly and surrounding an aperture (see figures 5 and 6); the flexible container being coupled to an outer periphery of the second portion and an impermeable cover member (12) having a second connector (27); wherein the first connector includes one of a groove and a key and the second connector includes the other one of the groove and the key; wherein the groove includes a first peripheral wall

and a second peripheral wall, at least one of the first peripheral wall and the second peripheral wall being flexible and wherein the first peripheral wall includes an indentation and protrusion (see Figures 7-9 embodiments); and wherein the first connector and the second connector may be releasably engaged to provide a hermetic seal. See Figures 1-2 and 7-9 embodiments and column 2, lines 61-67 and column 3, lines 20-38. Armstrong '104 does not appear to teach the key to have a width greater than the distance between the protrusion and the second peripheral wall of the groove and at least one of the first peripheral wall and the second peripheral wall configured to flex in response to the key passing between the protrusion and the second peripheral wall and for the container to be made of flexible material conformable to the wipes contained therein and the collar and the cover made of a second material. Luburic discloses a hermetic storage system where the key has a width greater than the distance between the protrusion and the second peripheral wall of the groove and at least one of the first peripheral wall and the second peripheral wall configured to flex in response to the key passing between the protrusion and the peripheral wall for easier and tighter snapping action to provide a tighter hermetic seal (See Figures 6 and 7 embodiments and paragraph 0031). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide a key and groove arrangement with the key having a width greater than the distance between the protrusion and at least one of the first peripheral wall and the second peripheral wall configured to flex in response to the key passing between the protrusion to the

container of Armstrong '104 as taught by Luburic to provided a better and tighter hermetic seal when the lid is closed on the body container.

Nakamura '575 discloses a resealable dispenser-container for wet tissues comprising a container, made of a flexible and impervious film sheet, and a tray/collar member, made of a second material harder than said container. The flexible sheet constituting the container body 11 may be a film made of synthetic resins such as polyethylene, polypropylene, polyamide, polyester, and polyvinyl chloride, and the film may be a single layer or a laminated layer. The film may be a laminated layer of the above-mentioned film and an aluminum foil or paper. Therefore, the container body 11 is deformable which will inherently be conformable to the wipes contained therein. The sheet constituting the container body 11 may also be gas impervious or liquid impervious depending on the kind of the liquid impregnated in wet tissues 3, i.e., fibrous materials impregnated with liquid cosmetics or a medicine, contained in the container body 11. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the container of Armstrong '104 from flexible film material and the collar and cover from a second material as taught by Nakamura '575, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

"[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill."

Claims 35-41 are directed to the obvious method of making the hermetic container of Armstrong as modified above.

With respect to the collar being made separate, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the collar separate from the container, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. *Nerwin v. Erlichman*, 168 USPQ 177, 179, since applicant has not disclosed any criticality as why the collar should be formed independent of the flexible container. Further more, the instant application discloses in paragraph [0031] that the collar may be permanently coupled to the flexible container or may be detachably (separately) coupled to the flexible container.

The determination of patentability in a product-by-process claim is based on the product itself, even though the claim may be limited and defined by the process. That is, the product in such a claim is unpatentable if it is the same as or obvious from the product of the prior art, even if the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985). A product-by-process limitation adds no patentable distinction to the claim, and is unpatentable if the claimed product is the same as a product of the prior art.

With respect to claims 8 and 38, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the cover independent from the collar, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. *Nerwin v. Erlichman*, 168 USPQ 177, 179.

With respect to claims 9 and the shape of the container, it would have been an obvious matter of design choice to modify the shape of the container, since such a modification would have involved a mere change in the shape of a component which is only ornamental in function. "[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill." A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47.

4. Claims 13-17 are finally rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claim 1 above, and further in view of Ishikawa et al. (5,699,912). Armstrong '104 as modified above discloses all the limitations of the claims except for the second member defining a second aperture and a third member releasably engaging with the second member to form a continuous hermetic seal around the second aperture. Ishikawa '912 discloses a hermetic storage system for containing wipes where the second member defining a second aperture and a third member releasably engaging with the second member to form a continuous hermetic seal around the second aperture for allowing the wipes to be individually picked out and maintaining the remaining wipes in a sterilized condition. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the second member of Armstrong '104 with a second aperture and a third member releasably engaging with the second member to form a continuous hermetic seal

around the second aperture as taught by Ishikawa '912 for allowing the wipes to be individually picked out and maintaining the remaining wipes in a sterilized condition. "[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill."

***Response to Arguments***

5. Applicant's arguments filed 03/08/2007 2006 have been fully considered but they are not persuasive.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). The above references are all directed to a storage system, the claims would have been obvious because the technique for improving a particular class of devices was part of the ordinary capabilities of a person of ordinary skill in the art, in view of the teaching of the technique for improvement in other situations.

"[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill."



In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). "A combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." "When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability." *Id.*

With respect to applicant's argument that Armstrong teaches away from the combination suggested by the Examiner because such a combination would leave Armstrong unsuitable for its intended purpose of achieving a desired stacking function, the stacking function of Armstrong container is possible by the conventional stacking lugs 24 which are provided in each of the radiused sections 17 transitioning the sidewalls 14 and 14A, namely, in each of the four corners of the base 11 and serve to prevent a stacked array of base members 11 from becoming compressed together when stacked. In other words, the stacking lugs 24 will maintain a specific spacing between the sidewalls 14 and 14A of the mutually adjacent base members 11 so as to allow air to enter the aforesaid space and facilitate a removal of one base member 11

from within the next mutually adjacent base member. These lugs remain the same and are unchanged after combining the above references, which therefore will not affect the stacking capabilities of Armstrong .

***Conclusion***

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JILA M. MOHANDESI whose telephone number is (571)272-4558. The examiner can normally be reached on MONDAY-FRIDAY 7:30-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey YU can be reached on 571-272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JILA M MOHANDESI/  
Primary Examiner, Art Unit 3728

JMM

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July 03, 2008